March 30, 2003

Hon. Susan Hoffmann
Councilmember and Liaison to the Board of Appeals
Mr. Arthur Chambers
Director of Community Planning
Rockville City Hall
111 Maryland Avenue
Rockville, Maryland 20850

Re: Zoning Ordinance Issues for Consideration by the Mayor and Council

Dear Councilmember Hoffmann and Mr. Chambers:

In deciding certain variance and special exception cases during the last few years, the Board of Appeals has wrestled with a number of issues that the City's zoning ordinances raise. Accordinglyl, the members of the Board have compiled these items for submission to the Mayor and Council for their consideration and action, in consultation with the City's planning staff. We submit these items now, understanding that a general review of the City's zoning ordinances is underway, as a follow-on to the recent Master Plan update. Each item is discussed in some depth in the memoranda that follow, prepared by various members of the Board. Briefly, the list, without any ordering of priority, includes six issues:

1. Economic need analysis for certain commercial special exceptions
    - A: Eliminate confining assessment of need to City residents
    - B: Eliminate economic need findings altogether
2. Fence heights in front yards of industrial zones
3. Porch set-backs and current residential planning ideas
4. Concept of accessory apartments; clarification of conditions for accessory apartments
5. Variances to accommodate handicapped individuals
6. Deck/porch encroachments in overlay or special zones

The Board is, of course, available to meet with the Council and/or staff to further discuss these items.

Sincerely,
Board of Appeals

Alan B. Sternstein, Chair
David Hill
Steven Johnson
Roy Deitchman

Item 1-A

Eliminate "within City" Scope for Finding Economic Need for Commercial Special Exceptions

The conditions for certain special exceptions require the Board of Appeals to make a finding that the proposed use is necessary for the service and/or convenience of residents within the City. It may be that sales or service to City residents alone would not justify the need, even though the business would be justified in the broader geographic market it would naturally serve. Confining the determination of need to City residents, therefore, as opposed to persons within a geographic market that would include the County and, conceivably, beyond, may only result in excluding from the City business that would be employers of City residents, taxpayers to the City, and providers of services or goods convenient to at least some residents of the City.

This requirement may have made sense when suburban Rockville was not heavily populated. Now, however, Rockville is part of a broad metropolitan area, whose population distribution is not defined by political boundaries.

The Board does not think this balkanization dictated by the literal terms of the zoning ordinances is an intended or desirable outcome and, therefore, unanimously recommends the elimination of the "within City" constraint for economic needs analysis.

Item 1-B

Eliminating the Finding of Economic Need for Commercial Special Exceptions

The provisions for certain special exceptions require the Board of Appeals to make findings that the proposed use is necessary to the service and or convenience of others in the vicinity of that use. See Sec. 25-353 (automobile filling station); Sec. 25-354 (bank branch office); Sec. 25-364 (restaurants in industrial zones); and Sec. 25-365 (resale sales and personal services in industrial zones). Strictly speaking, these provisions require the applicant to provide an economic analysis demonstrating the need for the proposed use.

Some, members of the Board believe that requiring the subject findings is bad policy. Other members of the Board, particularly Mr. Johnson, believe that the Board should continue to make need determinations. The issue for the Mayor and Council to consider is whether the best test for need is the marketplace itself, as reflected in the decision by an individual to commit resources to a particular use and in the ultimate response by purchasers to that use. Focusing on just the matter of need, as opposed to resource efficiency, is arguably misplaced. If, for example, an applicant believes that there is a need for a filling station at a given location or that the applicant can run a more efficient and, therefore, less costly filling station at a location where another is nearby, then, from purely an economic standpoint, the Board should be permitted to indulge the applicant's decision, even if there is another station in the vicinity. The best judge of need is most likely to be the applicant proposing to devote and risk substantial resources in implementing and conducting the proposed use. Likewise, even if the market would only support one station, who is to say whether the applicant will or will not run a more efficient (and, therefore, less costly) operation than the other, existing use? "The proof of the pudding," as they say, "is in the tasting." Precluding the proposed use on the basis of the Board's uninformed perception of need may only result in protecting existing but less efficient and, therefore, more costly uses, resulting in the delivery of higher cost goods or services to consumers.

None of this is to say that the Board should not consider whether a proposed use will change the character of a neighborhood, as is required for all special exceptions, and, if the character would be changed, further consider whether the exception should be granted, in view of the need for the proposed use. Sec. 25-338(2)(d). In this more limited respect, the Board may have no choice but to make a needs assessment, and, it is submitted, that the Board should not lightly grant any special exception that would have the effect of changing the character of a neighborhood. It is recommended, therefore, that Sec. 338(2)(d) be amended to provide that a special exception significantly changing the character of a neighborhood may only be granted if the need for the proposed use is clearly essential and not met by any existing use.

Item 2

Permitted Encroachments (Fences) in Industrial Zones

Section 251 of the Rockville Zoning and Planning Code establishes as a permitted encroachment fences of up to eight feet in height in the rear or side yard and up to four feet in the front yard. The Code makes no distinction between residential and industrial zones with respect to this and permitted encroachment. It is the sense of the Board of Appeals, however, that restricting fences in the front yard of lots in industrial zones to four feet is inconsistent with the many uses permitted in such zone. In particular, a four feet front yard fence is incompatible with the contractor's storage yard, which is permitted as of right in the I-1 zone. A fence higher than four feet is necessary to properly secure such a use.

In addition, generally, it is advantageous in industrial zones to place buildings in the rear of the lot. Consequently, the greatest need for security is in the front yard.

For these reasons, the Board unanimously believes that Section 25-1 should be amended as follows:

Encroachment, permitted means ...

...

(4) A fence, wall or hedge not exceeding eight feet. in height is permitted in the side yard or rear yard of any lot. A fence, wall or hedge not exceeding forty-two (42) inches. in height is permitted in the front yard. **In an industrial zone, a fence not exceeding eight (8) feet in height is permitted in the front yard. In any zone other than an industrial zone,** in no case shall a fence, wall or hedge exceeding forty-two (42) inches in height be permitted between any street line and the nearest line of a building or enclosed portion of a building. On a corner lot or through lot, the yards lying between the principle building and the streets shall be deemed front yards; and no fence, wall or hedge exceeding forty-two (42) inches in height**, with the exception of fences in industrial zones,** shall be erected in this area, except the street abutting is classified as an arterial highway or greater, a fence, wall or hedge not exceeding six (6) feet in height is permitted in the front yard.

Item 3

Porch Set-Backs and Current Residential Planning Ideas

In order to improve interactions in a residential community, new community residential planning includes large front porches. It is believed that if people use their front porches as a living space, they will be more likely to strike up a casual conversations with neighbors walking past their homes. Also, by having large front porches, streets appear narrower leading to reduced driving speeds through a neighborhood.

With these new developments, the Rockville Zoning and Planning Code can take into account the move to a more diverse residential walking community that has smaller, denser lots with a friendlier residential streetscape and that encourages walking and community interaction. For established residential communities in Rockville, there have been setback requirements for front porches that can discourage construction of porches.

Currently, the City's ordinances provide for a 25 to 30 foot setback for one-family detached homes in the R-90, R-75, R-60 and R-40 zones. In order to encourage the construction of porches, it is unanimously recommended that Sec. 25-311 of the Code be revised to encourage the construction of front, unenclosed porches in existing residential zones.

The Code revision will require attention to the following elements or some variation of them:

Definition of an unenclosed front porch, for example: a covered entrance to a building or structure which is unenclosed except for columns supporting the porch roof, projects out from the main wall of the building or structure, has a separate roof or an integral roof with the principle building or structure to which it is attached, and may include railings and steps.

Material, for example: the roof of the porch should be of the same quality and material as the existing roof of the residence.

Footings, for example: shall be a complete concrete base or footings at grade level, with the number dictated by the size and height of the proposed structure.

Setback, for example: decks can have a maximum encroachment into the setback of 12 feet (into the current 25-30 foot setback) and be no longer than the front width of the existing home. Corner lots may be permitted to have a"wrap around," porch with the front and street side encroaching no more than 12 feet into the setback.

Item 4

Principle and Wording of Accessory Apartments Special Exceptions (Sec. 25-372)

This City's decision years ago to allow for accessory apartments as a special exception has not met with acceptance over time. In some instances, applications involving accessory apartments in neighborhoods comprising single family homes have been controversial. As citizens did duiring the public hearings on this provision, residents view such proposals in those neighborhoods as a higher density encroachment. Although the ordinance specifies several conditions for the grant of these special exceptions for accessory apartments, it does not express any general principle for when and where they are appropriate, particularly when the intended use is for rental purposes. Perhaps the ordinance's lack of conditions in this regard reflects the City's policy determination when it provided for accessory apartments, but given the continuing controversy in some instances and the relatively few requests for such exceptions, particularly for rentals, some members of the Board suggest that the City revisit the matter. It does not appear that the provision has been resorted to much, in practice, or, therefore, that the provision has done much to increase the affordable housing stock in the City.

Short of this, all members of the Board note a specific difficulty in the ordinance language. Sec. 25-372(b)(3)(a) can be read to suggest a limit on accessory appartments that is more restrictive than is believed to be intended. The text literally reads "The accessory apartment must not be located on a lot: a) Which is occupied by a family of unrelated persons...." This suggests that only accessory apartments occupied by people related to persons occupying the main dwelling are allowed. The Board, however, has been applying the language to mean only that apartments are not allowed for residence by unrelated people, but that no relationship is required between occupants of the apartment and main dwelling. Still the language is imprecise on this point. Assuming the Board's approach to be the ordinance's intent, the Board suggests a rewording to state: "... a) On which the main dwelling or accessory apartment is occupied by unrelated persons."

Item 5

Potential ADA Conflict with Variance Requirements

Variances are limited to situations "owing to conditions peculiar to the property" [p. 1944.2 (v. 9/25/01)]. That is, some attribute of the property must exist to grant the variance. This makes sense because variances are granted in perpetuity, transferring with the parcel. Yet, the Americans with Disabilities Act or, at least, the public interest that the Act reflects requires reasonable accommodation for disabilities. A disability is an attribute of a person. Therefore, it does not qualify for consideration pertaining to this variance finding.

This conflict arises, for example, when handicap access structures (such as graded ramps or lifts) encroach into set-back areas of properties. Adequately designed access structures would likely qualify as reasonable accommodation for structural access under ADA rights. While this would likely qualify as a demonstration of practical need for a variance, a separate and necessary finding is peculiarity of the property. Such a finding for the property may have no true basis. This would technically obligate the Board to deny such a variance application, since a necessary finding would go unfulfilled, notwithstanding a separate finding of practical need regarding a disability condition or even a right of reasonable accommodation under the ADA.

A solution here is either recognizing some stringent finding of handicap considerations giving rise to an overriding practical need that would alleviate the requirement to find a peculiarity of the property. Or, perhaps, another classification of variance is desirable (if so, this may elevate the issue to a State law question). This new classification would apply to instances where a pertinent physical disability exists to structural variances. Findings of peculiarity of the property would be relaxed and a limited duration for the variance would apply, matching the applicability of the handicap condition. For example, a homeowner that becomes disabled could get a "disability variance" for a covered ramp/porch that provided access to the raised entrance of their home. The granting of the variance would be based primarily upon a finding that a reasonable accommodation to their disability could be achieved and the proposed structure met general variance requirements. But no finding of uniqueness of the property would be necessary. When this disabled homeowner vacated the property, or more precisely, when the disability condition no longer pertains to the site, the variance would lapse. Like a special exception, such a "disability variance" would not transfer to the next property owner unless they qualify, in a separate consideration, for an extension of the same need/circumstances. In connection with this proposal, consideration also needs to be given to assuring that subsequent purchaser is aware that the variance will not survive the sale, without re-application to the Board and approval of a new variance.

Item 6

Deck/porch Encroachments in Overlay or Special Development Zones

A number of types of special overlays or residential overlays (CPD, PRU, or RTH) require more substantial perimeter set-backs around the whole site. This is typically greater than the build-at set-backs of an underlying zone or for a particular building style. This leads to some ambiguity on the relevant standard to be applied for set-back encroachment applications on such sites. The recurrent instance of this is decks and porches on townhouses at the perimeter of a development site. Often, such units are built exactly to the set-back with suggestive features (such as second story sliding doors) that beg for such additional encroachment structures. On an individual lot basis (which is how applications reach the Board of Appeals), it is difficult to apply a reasonable argument for why this one lot does not meet variance requirements, simply because of its position relative to a constraint of the whole developed site. Therefore, to give the whole site set-back substance, further siting requirements for the original structures are suggested. Siting buildings with features suggesting obvious but, nevertheless, encroaching improvements amounts to exploitation by developers/builders, and should be curbed. Residents, pursuing these obvious and often common, but encroaching, improvements need better protection. Current conditions are compromising the effectiveness of such perimeter set-back requirements, as well as permitting developers to mislead purchasers, which is at the heart of the Board's unanimous concerns.